

127836

STATE OF MICHIGAN
IN THE SUPREME COURT

BEVERLY HEIKKILA, Personal
Representative for the Estate of
Sheri L. Williams,

Plaintiff-Appellee,

v

MARC ROLLAND SEVIGNY, J.R. PHILLIPS
TRUCKING, LIMITED, a foreign corporation,

Defendants-Appellants,
and

NORTH STAR, INC., a Michigan corporation,
and INTERNATIONAL MILL SERVICE, INC.,
a Michigan corporation, Jointly and Severally,

Defendants.

_____ /

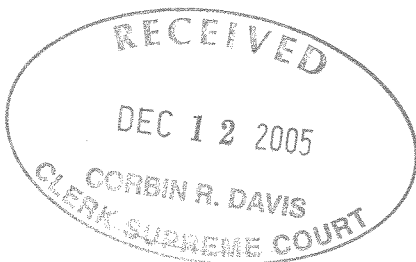
Supreme Court
Case No. 127836

Court of Appeals
Case No. 246761

Monroe Circuit Court
Case No. 00-11135-NI

**DEFENDANTS-APPELLANTS, MARC R. SEVIGNY AND J.R. PHILLIPS
TRUCKING'S REPLY AND SUPPLEMENTAL BRIEF**

PROOF OF SERVICE



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INTRODUCTION

This matter is before the Court on applications filed by each of the defendants, seeking review of the December 7, 2004 Opinion of the Michigan Court of Appeals which reversed the summary disposition granted to defendants by the circuit court, thereby concluding that one or more of the defendants could be legally liable for the injuries sustained by Sheri Williams when she was struck by an unidentified object which came through her windshield while she was driving in the vicinity of property owned by defendant, North Star Steel. With respect to defendants Marc Sevigny and J.R. Phillips Trucking, Ltd., it is plaintiff's theory that a truck driven by Sevigny picked up a piece of slag between its tires while on the North Star Steel property and that, while on the public road, this piece of slag, which was never found, dislodged from the tire and was propelled through the windshield. It is the position of defendants Sevigny and J.R. Phillips, as fully set forth in its pending Application for Leave to Appeal, that they were properly granted summary disposition because they owed no duty to plaintiff to conduct multiple inspections of his tire before leaving the North Star premises, and that, in any event, there was insufficient evidence to support plaintiff's legal theory of liability and causation.

On October 14, 2005, this Court entered orders directing that oral argument be scheduled on the pending applications, and affording the parties an opportunity for supplemental briefing. As of that date, plaintiff had not filed any pleading in opposition to defendants' Application, and defendants determined that any supplemental briefing would simply reiterate arguments already set forth in their pending Application. However, on November 21, 2005, plaintiff filed a "Response Brief in Opposition to Defendants' Applications for Leave or Other Peremptory Action." Defendants' review of this pleading suggested that some additional comment was appropriate in order to respond to some of the factual and policy arguments set forth therein, and accordingly offer this supplemental brief.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT MARC SEVIGNY OWED NO DUTY TO PLAINTIFF TO CONDUCT MULTIPLE INSPECTIONS OF HIS TIRES BEFORE LEAVING THE PREMISES OF NORTH STAR STEEL.

In response to defendants' pending Application, plaintiff erroneously relies on sections of the Federal Motor Carrier Safety Regulations which actually serve to refute the onerous duty of inspection suggested by plaintiff. Consideration of plaintiff's position necessarily commences with the recognition that the motor carrier industry is one of the most highly regulated industries in the United States, as demonstrated in 49 CFR, §§ 355 - 399, including specific regulations pertaining to inspection. Moreover, these regulations place particular emphasis on *when* such inspections are to occur, as well as *which part* of the motor vehicle is subject to that inspection. 49 CFR 396.3(a) provides that "[e]very motor carrier shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control." The Department of Transportation provides a specific interpretation of §396.3 in its publication of the Federal Motor Carrier Safety Act, indicating the following:

Question 1: What is meant by "systematic inspection, repair, and maintenance"?

Guidance: Generally, systematic means a *regular or scheduled program* to keep vehicles in a safe operating condition. §396.3 does not specify inspection, maintenance, or repair intervals because such intervals are fleet specific and, in some instances, vehicle specific. The inspection, repair and maintenance intervals are to be determined by the motor carrier. The requirements of §§396.11, 396.13, and 396.17 are in addition to the systematic inspection, repair, and maintenance required by §396.3. [Emphasis added]

Thus, §396.3 pertains to a regular schedule of inspection and is not a regulation requiring daily trip inspections by commercial drivers. In that regard, §396.13 provides for a driver inspection as he begins his day, as well as a driver inspection at the end of the day:

Before driving a motor vehicle, the driver shall:

- (a) Be satisfied that the motor vehicle is in safe operating condition;
- (b) *Review the last driver vehicle inspection report*; and
- (c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit which is no longer part of the vehicle combination. [Emphasis added]

The requirement of a report and “last driver inspection” that a new driver must review each day before he begins his travel, is set forth in 49 CFR 396.11, Driver Vehicle Inspection Reports, which states:

(a) **Report required.** Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day’s work on each vehicle operated and the report shall cover at least the following parts and accessories:

- Service brakes including trailer brake connections
- Parking (hand) brake
- Steering mechanism
- Lighting devices and reflectors
- Tires
- Horn
- Windshield wipers
- Rear vision mirrors
- Coupling devices
- Wheels and rims
- Emergency equipment

This *end of the driver’s day* inspection regulation is a *prelude* to §396.13 noted above.

The driver must inspect his vehicle at the beginning of his travels and be certain that any repairs noted by the prior driver have been completed so that he may then begin his travels in a safe vehicle.

The Department of Transportation has taken into consideration when intra-day inspections are called for and address them in §392.9(2) providing that a motor carrier must

examine the motor vehicle's cargo and its load securing devices within the first 25 miles after beginning a trip and cause any adjustments to be made to the cargo or load securing devices as may be necessary to maintain the security of the commercial motor vehicle's load. Under subsection (3), the driver must re-examine the commercial motor vehicle's cargo and its load-securing devices periodically during the course of transportation and cause any adjustments to be made to the cargo and load-securing devices as maybe necessary to maintain the security of the commercial vehicle's load. A periodic re-examination and any necessary adjustment must be made (I) when the driver makes a change of his or her duty status, and (ii) after the commercial motor vehicle has been driven for three hours, or (iii) after the commercial motor vehicle has been driven for 150 miles, whichever occurs first. Thus, the Department of Transportation has taken up the topic of intra-day inspection in specific terms, and thus cannot be seen to have simply left the trucking industry to its own devices.

Nor does plaintiff's reference to §396.7 relate to a duty of ongoing inspection to determine if something is between the duals during the day's travels; rather, it is a reference to the mechanical condition of the motor vehicle. That provision provides that "[a] motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle." Subsection (b) regarding exemptions indicates "any motor vehicle discovered to be in an unsafe condition while being operated on the highway may be **continued in operation** only to the nearest place where **repairs can be safely effected**. Such operation shall be conducted only if it is less hazardous to the public than to permit the vehicle to remain on the highway."

(Emphasis added) The obvious reference here is to *repair* the vehicle to cure any unsafe operation. The motor carrier is not called upon to engage in inspections beyond that specifically designated within the Federal Motor Carrier Safety Act as outlined above.

The duty that plaintiff seeks to create in this case is not found under the Federal Motor Carrier Safety Act, and the suggested requirement that a driver inspect his vehicle, and specifically the dual tires, anytime there is any chance that something may have been caught between the dual tires would create an overwhelming burden. In Michigan, and throughout the country, hundreds of thousands of miles of gravel and dirt roads exist, as do thousands of residential and commercial construction sites, junkyards, steel yards, landfills and the like. Each and every time an interstate traveling semi-tractor/trailer traverses those roads, they do so with the potentiality of something becoming caught between their dual tires. Plaintiff would require them to stop periodically throughout each day to inspect their tires. Would plaintiff have them stop every 100 yards, every quarter mile, or at every intersection where a gravel road or dirt road meets a paved road?¹ Are they to be pulled over immediately if ever advised by law enforcement officers to move onto the shoulder of the road as a result of an accident due to the **potentiality** of debris being on the shoulder of the roadway? Shall each and every dump truck and semi-tractor/trailer be required to stop and inspect their vehicle while leaving every construction job site, residential or commercial, because of the possibility that something on such a job site may have become lodged in their dual tires? The burden that plaintiff seeks to place upon the interstate transportation industry is not found within the Federal Motor Carrier Safety Act and has been specifically rejected by a Michigan trial court and the Michigan Court of Appeals.

Malloy v Maclure Trucking, CA #223405 (August 21, 2001).

¹ Consider, for example, that in the case at bar plaintiff complains that Front Street (where the accident took place) was littered with debris. Following plaintiff's theory of liability, would they also claim that Mr. Sevigny had a duty to stop his vehicle the first tenth of a mile or quarter of a mile traveling upon a debris-strewn roadway?

II. WHERE PLAINTIFF SOUGHT TO IMPOSE LIABILITY ON DEFENDANTS MARC SEVIGNY AND J.R. PHILLIPS TRUCKING, PREMISED ON A THEORY THAT SLAG EMBEDDED BETWEEN THE TIRES OF SEVIGNY'S TRUCK HAD DISLODGED AND WAS PROPELLED INTO PLAINTIFF'S WINDSHIELD, SUMMARY DISPOSITION WAS PROPERLY GRANTED TO DEFENDANTS WHERE, *INTER ALIA*, THERE WAS NO EVIDENCE THAT ANY OBJECT HAD ACTUALLY BEEN EMBEDDED BETWEEN THE TIRES, AND WHERE THERE WAS NO EVIDENCE THAT THE OBJECT THAT WENT THROUGH PLAINTIFF'S WINDSHIELD WAS SLAG, AND WHERE THERE WAS NO EVIDENCE THAT ANY EXTRA INSPECTIONS WOULD HAVE AVOIDED THIS ACCIDENT.

In order to avoid the conclusion that her theory of liability is premised on mere speculation and conjecture, plaintiff has ignored the record of this case. For example, she has ignored the testimony of investigating officers and witnesses who described other objects found at the scene of the accident, and booked into evidence as possible projectiles involved in this accident. She has ignored the testimony of the investigating State Police accident reconstructionist that there was no evidence to support plaintiff's theory that a large object deflected off the fourth or eighth axles of the Sevigny vehicle, a conclusion with which Motor Carrier Officer Chapp agreed. See, *e.g.*, pages 8, 9 and 10 of defendants' Application for Leave to Appeal.

Moreover, relying on the testimony of David Sterns, plaintiff speculates that defendant Sevigny did not, in fact, do an appropriate inspection of his motor vehicle after loading, notwithstanding his testimony and indication to police officers that he did inspect his truck and remove something from his wheels. However, a review of Mr. Sterns testimony does not refute Sevigny's testimony as Mr. Sterns was not able to identify the vehicle from which he saw a driver pull something between the duals that day, and could not say that the driver was someone other than Sevigny. See, Stern deposition, pp 13-14, 17.

In support of her contention that any slag picked up by Mr. Sevigny's truck must have been picked up on the North Star Steel property, the plaintiff points out that gouge marks *found only upon the roadway and not on North Star Steel property* were exactly 10 feet 8 inches apart. She points out that this was the circumference of Mr. Sevigny's truck tires, but fails to note that this is the circumference of virtually all semi-tractor/trailer truck tires, as testified to by Sgt. Richardson, the accident reconstructionist. Plaintiff further ignores that the marks found began in the westbound lane, and not on the property of North Star Steel or IMS. Indeed, Officer Richardson specifically testified that the gouge marks were found in the westbound lane and ran parallel to the center line of the roadway, as photographed and documented by the police officers. (Richardson dep, pp 10-13) More importantly, Officer Richardson indicated that there were no associated marks in the eastbound lane of travel:

Q. In the photographs, apparently indicate that all of those marks were in the westbound lane--the westbound innermost lane, is that correct?

A. That's correct.

Q. There were no marks at all in the eastbound lane, were there, sir?

A. I can't answer that--

Q. Sir?

A. If there were no marks at all. I am sure there may be some marks, but--

Q. None that you associated with this pattern that ran along?

A. That's correct.

Q. In the westbound lane, is that correct?

A. That is correct.

Q. *That pattern did not continue into the eastbound lane, did it, sir?*

A. *It did not.*

(Richardson deposition, p. 13) (Emphasis added)

Thus, the investigator conclusively testified that the markings found upon the roadway did not travel onto the North Star Steel/IMS property, nor did they exist in the eastbound lane of travel, which Mr. Sevigny was required to cross over in order to enter into the westbound lane of travel.²

Attempting to buttress her case by reference to “circumstantial physical evidence”, plaintiff contends that the gouge marks ended at the point of impact. However, no point of impact was ever established. She states as fact that no other semi-trucks or vehicles were in the area while the evidence is clear that Dean Rioux’s vehicle was traveling in the area, as was the vehicle of Bradley Phillips and witnesses Hill and Maniaci. Plaintiff argues that the object must have come from the westbound lane because it traveled from the left lower portion of her windshield through the right upper back window, virtually in a straight line. Once again, there is no testimony to support these statements.

Plaintiff also attempts to bolster her case through the testimony of co-defendant’s expert witness, Mr. Branch. However, the premise of Mr. Branch’s testimony, as set forth at page 30 of plaintiff’s brief, was *to assume* that the marks in the roadway went back to the main driveway of IMS/North Star Steel. He did not testify to this as a fact; nor did he testify that Mr. Sevigny would have picked up an object on the IMS/North Star property. Indeed, when Mr. Branch was actually asked his opinion of where Mr. Sevigny may have picked up the object, he indicated as follows:

² Plaintiff attempts to avoid this testimony by reference to testimony by Mr. Suttles, to the effect that he saw paint marks created by police officers, but this testimony does not support a finding of actual marks going into the facility.

Q. Do you have an opinion as to where he picked it up?

A. Well, the information that I have is that Mr. Seigny had his lift axles up when he left and put them down after he straightened out, after he straightened his truck out. And here we only have gouge marks that in the last couple of hundred feet prior to where the impact went through the Escort. And so it is possible that, (a) the object was in the wheels and was lowered down when the lift axles came down, or that the object was picked up out on the road.

Q. Or that the object was in some axle other than a lift axle, correct?

A. It's possible that it was in another axle other than a lift axle and that the axle would have picked up near driveway B as well.

(Branch deposition, page 71)

The layers of conjecture or guesswork required by any trier of fact to reach plaintiff's conclusions in this case grow when one recalls that no slag was found at the scene, and that all testimony indicates that nothing on the vehicle demonstrates that a heavy object would have been deflected from the Seigny vehicle into the westbound lane of the roadway. Plaintiff's case is not based upon circumstantial evidence, but only upon multiple layers of speculation, unsupported by testimony.

CONCLUSION

Summary disposition was properly granted in this case, and the trial court appropriately rejected a theory of liability premised solely upon multiple layers of conjecture, speculation and unfounded claims of conspiracy. With regard to the threshold question of duty, it appropriately rejected plaintiff's contention that it would not be too burdensome to require those engaged in interstate transport to stop and inspect their tires on every occasion where they may have encountered something which could lodge. The duty plaintiff wishes to create in this case goes beyond the inspection duties clearly set forth in the Federal Motor Carrier Safety Act, and does

not exist under federal or state statutory law, nor under the common law. Moreover, it would gravely impact the interstate transport of goods and services in the United States.

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622004.1

§396.7 Unsafe operations forbidden.

(a) **General** — A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.

(b) **Exemption** — Any motor vehicle discovered to be in an unsafe condition while being operated on the highway may be continued in operation only to the nearest place where repairs can safely be effected. Such operation shall be conducted only if it is less hazardous to the public than to permit the vehicle to remain on the highway.

§396.9 Inspection of motor vehicles in operation.

(a) **Personnel authorized to perform inspections** — Every special agent of the FMCSA (as defined in Appendix B to this subchapter) is authorized to enter upon and perform inspections of motor carrier's vehicles in operation.

(b) **Prescribed inspection report** — The Driver Vehicle Examination Report shall be used to record results of motor vehicle inspections conducted by authorized FMCSA personnel.

(c) **Motor vehicles declared "out of service".**

(1) Authorized personnel shall declare and mark "out of service" any motor vehicle which by reason of its mechanical condition or loading would likely cause an accident or a breakdown. An "Out of Service Vehicle" sticker shall be used to mark vehicles "out of service".

(2) No motor carrier shall require or permit any person to operate nor shall any person operate any motor vehicle declared and marked "out of service" until all repairs required by the "out of service notice" have been satisfactorily completed. The term "operate" as used in this section shall include towing the vehicle, except that vehicles marked "out of service" may be towed away by means of a vehicle using a crane or hoist. A vehicle combination consisting of an emergency towing vehicle and an "out of service" vehicle shall not be operated unless such combination meets the performance requirements of this subchapter except for those conditions noted on the Driver Vehicle Examination Report.

(3) No person shall remove the "Out of Service Vehicle" sticker from any motor vehicle prior to completion of all repairs, required by the "out of service notice."

(d) **Motor carrier disposition.**

(1) The driver of any motor vehicle receiving an inspection report shall deliver it to the motor carrier operating the vehicle upon his/her arrival at the next terminal or facility. If the driver is not scheduled to arrive at a terminal or facility of the motor carrier operating the vehicle within 24 hours, the driver shall immediately mail the report to the motor carrier.

(2) Motor carriers shall examine the report. Violations or defects noted thereon shall be corrected.

(3) Within 15 days following the date of the inspection, the motor carrier shall —

(i) Certify that all violations noted have been corrected by completing the "Signature of Carrier Official, Title, and Date Signed" portions of the form; and

(ii) Return the completed roadside inspection form to the issuing agency at the address indicated on the form and retain a copy at the motor carrier's principal place of business or where the vehicle is housed for 12 months from the date of the inspection.

[44 FR 38526, July 2, 1979, as amended at 49 FR 38290, Sept. 28, 1984; 57 FR 40964, Sept. 8, 1992]

DOT Interpretations — §396.9

Question 1: Under what conditions may a vehicle that has been placed "out of service" under §396.3 be moved?

Guidance: The vehicle may be moved by being placed entirely upon another vehicle, towed by a vehicle equipped with a crane or hoist, or driven if the "out of service" condition no longer exists.

Question 2: Is it the intent of §396.9 to allow "out of service" vehicles to be towed?

Guidance: Yes; however, not all out of service vehicles may be towed away from the inspection location. The regulation sets up a flexible situation that will permit the inspecting officer to use his/her best judgment on a case-by-case basis.

§396.11 Driver vehicle inspection report(s).

(a) **Report required.** Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated and the report shall cover at least the following parts and accessories:

- Service brakes including trailer brake connections
- Parking (hand) brake
- Steering mechanism
- Lighting devices and reflectors
- Tires
- Horn
- Windshield wipers
- Rear vision mirrors
- Coupling devices
- Wheels and rims
- Emergency equipment

(b) **Report content.** The report shall identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown. If no defect or deficiency is discovered by or reported to the driver, the report shall so indicate. In all instances, the driver shall sign the report. On two-driver operations, only one driver needs to sign the driver vehicle inspection report, provided both drivers agree as to the defects or deficiencies identified. If a driver operates more than one vehicle during the day, a report shall be prepared for each vehicle operated.

(c) **Corrective action.** Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the driver vehicle inspection report which would be likely to affect the safety of operation of the vehicle.

(1) Every motor carrier or its agent shall certify on the original driver vehicle inspection report which lists any defect or deficiency that the defect or deficiency has been repaired or that repair is unnecessary before the vehicle is operated again.

(2) Every motor carrier shall maintain the original driver vehicle inspection report, the certification of repairs, and the certification of the driver's review for three months from the date the written report was prepared.

(d) **Exceptions.** The rules in this section shall not apply to a private motor carrier of passengers (nonbusiness), a driveaway-towaway operation, or any motor carrier operating only one commercial motor vehicle.

44 FR 38526, July 2, 1979, as amended at 45 FR 46425, July 10, 1980; 53 FR 18058, May 19, 1988; 59 FR 8753, Feb. 23, 1994; 63 FR 33279, June 18, 1998]

DOT Interpretations — §396.11

Question 1: Does §396.11 require the DVIR to be turned in each day by a driver dispatched on a trip of more than one day's duration?

Guidance: A driver must prepare a DVIR at the completion of each day's work and shall submit those reports to the motor carrier upon his/her return to the home terminal. This does not relieve the motor carrier from the responsibility of effecting repairs and certification of any items listed on the DVIR, prepared at the end of each day's work, that would be likely to affect the safety of the operation of the motor vehicle.

Question 2: Does §396.11 require that the power unit and the trailer be inspected?

Guidance: Yes. A driver must be satisfied that both the power unit and the trailer are in safe operating condition before operating the combination.

Question 3: May more than one power unit be included on the DVIR if two or more power units were used by a driver during one day's work?

Guidance: No. A separate DVIR must be prepared for each power unit operated during the day's work.

Question 4: Does §396.11 require a motor carrier to use a specific type of DVIR?

Guidance: A motor carrier may use any type of DVIR as long as the report contains the information and signatures required.

Question 5: Does §396.11 require a separate DVIR for each vehicle and a combination of vehicles or is one report adequate to cover the entire combination?

Guidance: One vehicle inspection report may be used for any combination, provided the defects or deficiencies, if any, are identified for each vehicle and the driver signs the report.

Question 6: Does §396.11(c) require a motor carrier to effect repairs of all items listed on a DVIR prepared by a driver before the vehicle is subsequently driven?

Guidance: The motor carrier must effect repairs of defective or missing parts and accessories listed in Appendix G to the FMCSRs before allowing the vehicle to be driven.

Question 7: What constitutes a "certification" as required by §396.11(c)(1) and (2)?

Guidance: A motor carrier or its agent must state, in writing, that certain defects or deficiencies have been corrected or that correction was unnecessary. The declaration must be immediately followed by the signature of the person making it.

Question 8: Who must certify under §396.11(c) that repairs have been made when a motor vehicle is repaired en route by the driver or a commercial repair facility?

Guidance: Either the driver or the commercial repair facility.

Question 9: Must certification for trailer repairs be made?

Guidance: Yes. Certification must be made that all reported defects or deficiencies have been corrected or that correction was unnecessary. The certification need only appear on the carrier's copy of the report if the trailer is separated from the tractor.

Question 10: What responsibility does a vehicle leasing company, engaged in the daily rental of CMVs, have regarding the placement of the DVIR in the power unit?

Guidance: A leasing company has no responsibility to comply with §396.11 unless it is the carrier. It is the responsibility of a motor carrier to comply with part 396 regardless of whether the vehicles are owned or leased.

Question 11: Which carrier is to be provided the original of the DVIR in a trip lease arrangement?

Guidance: The motor carrier controlling the vehicle during the term of the lease (i.e. the lessee) must be given the original of the DVIR. The controlling motor carrier is also responsible for obtaining and retaining records relating to repairs.

Question 12: Must the motor carrier's certification be shown on all copies of the DVIR?

Guidance: Yes.

Question 13: Must a DVIR carried on a power unit during operation cover both the power unit and trailer being operated at the time?

Guidance: No. The DVIR must cover the power unit being operated at the time. The trailer identified on the report may represent one pulled on the preceding trip.

Question 14: In instances where the DVIR has not been prepared or cannot be located, is it permissible under §396.11 for a driver to prepare a DVIR based on a pre-trip inspection and a short drive of a motor vehicle?

Guidance: Yes. §396.11 of the FMCSRs places the responsibility on the motor carrier to require its drivers to prepare and submit the DVIR. If, in unusual circumstances, the DVIR has not been prepared or cannot be located the motor carrier may cause a road test and inspection to be performed for safety of operation and the DVIR to be prepared.

Question 15: Is it permissible to use the back of a record of duty status (daily log) as a DVIR?

Guidance: Yes, but the retention requirements of §396.11 and §395.8 must be met.

Question 16: Does §396.11 require that specific parts and accessories that are inspected be identified on the DVIR?

Guidance: No.

Question 17: Is the Ontario pretrip/posttrip inspection report acceptable as a DVIR under §396.11?

Guidance: Yes, provided the report from the preceding trip is carried on board the motor vehicle while in operation and all entries required by §396.11 and 396.13 are contained on the reports.

Question 18: Where must DVIRs be maintained?

Guidance: Since §396.11 is not specific, the DVIRs may be kept at either the motor carrier's principal place of business or the location where the vehicle is housed or maintained.

Question 19: Who is responsible for retaining DVIRs for leased vehicles including those of owner-operators?

Guidance: The motor carrier is responsible for retaining the original copy of each DVIR and the certification of repairs for at least 3 months from the date the report was prepared.

Question 20: Is a multi-day DVIR acceptable under §396.11 and 396.13?

Guidance: Yes, provided all information and certifications required by §§396.11 and 396.13 are contained on the report.

Question 21: Is a DVIR required by a motor carrier operating only one tractor trailer combination?

Guidance: No. One tractor semitrailer/full trailer combination is considered one motor vehicle. However, a carrier operating a single truck tractor and multiple semitrailers, which are not capable of being operated as one combination unit, would be required to prepare DVIRs.

Question 22: Are motor carriers required to retain the "legible copy" of the last vehicle inspection report (referenced in §396.11(c)(3)) which is carried on the power unit?

Guidance: No. The record retention requirement refers only to the original copy retained by the motor carrier.

Question 23: Does the record retention requirement of §396.11(c)(2) apply to all DVIRs, or only those reports on which defects or deficiencies have been noted?

Guidance: The record retention requirement applies to all DVIRs.

Question 24: How would the DVIR requirements apply to a driver who works two or more shifts in a single calendar day?

Guidance: Section 396.11(a) requires every driver to prepare a DVIR at the completion of each day's work on each vehicle operated. A driver who operates two or more vehicles in a 24-hour period must prepare a DVIR at the completion of the tour of duty in each vehicle.

Question 25: Section 396.11 requires the driver, at the completion of each day's work, to prepare a written report on each vehicle operated that day. Does this section require a "post trip inspection" of the kind described in §396.15?

Guidance: No. However, the written report must include all defects in the parts and accessories listed in §396.11(a) that were discovered by or reported to the driver during that day.

Question 26: Is the motor carrier official or agent who certifies that defects or deficiencies have been corrected or that correction was unnecessary required to be a mechanic or have training concerning commercial motor vehicle maintenance?

Guidance: No. Section 396.11 does not establish minimum qualifications for motor carrier officials or agents who certify that defects or deficiencies on DVIRs are corrected. With the exception of individuals performing the periodic or annual inspection (§396.19); and motor carrier employees responsible for ensuring that brake-related inspection, repair, or maintenance tasks are performed correctly (§396.25), Part 396 of the FMCSRs does not establish minimum qualifications for maintenance personnel. Motor carriers, therefore, are not prohibited from having DVIRs certified by company officials or agents who do not have experience repairing or maintaining commercial motor vehicles.

§396.13 Driver inspection.

Before driving a motor vehicle, the driver shall:

- (a) Be satisfied that the motor vehicle is in safe operating condition;
- (b) Review the last driver vehicle inspection report; and
- (c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit which is no longer part of the vehicle combination.

[44 FR 76526, Dec. 27, 1979, as amended at 48 FR 55868, Dec. 16, 1983; 63 FR 33280, June 18, 1998]

DOT Interpretations — §396.13

Question 1: If a DVIR does not indicate that certain defects have been repaired, and the motor carrier has not certified in writing that such repairs were considered unnecessary, may the driver refuse to operate the motor vehicle?

Guidance: The driver is prohibited from operating the motor vehicle if the motor carrier fails to make that certification. Operation of the vehicle by the driver would cause the driver and the motor carrier to be in violation of §396.11(c) and both would be subject to appropriate penalties. However, a driver may sign the certification of repairs as an agent of the motor carrier if he/she is satisfied that the repairs have been performed.

Question 2: At the end of the day's work and upon completion of the required DVIR, what does the driver do with the copy of the previous DVIR carried on the power unit?

Guidance: There is no requirement that the driver submit the copy of that previous DVIR to the motor carrier nor is there a retention requirement for the motor carrier.

§396.15 Driveaway-towaway operations and inspections.

(a) **General.** Effective December 7, 1989, every motor carrier, with respect to motor vehicles engaged in driveaway-towaway operations, shall comply with the requirements of this part. Exception: Maintenance records required by §396.3, the vehicle inspection report required by §396.11, and the periodic inspection required by §396.17 of this part shall not be required for any vehicle which is part of the shipment being delivered.

(b) **Pre-trip inspection.** Before the beginning of any driveaway-towaway operation of motor vehicles in combination, the motor carrier shall make a careful inspection and test to ascertain that:

- (1) The towbar or saddle-mount connections are properly secured to the towed and towing vehicle;
- (2) They function adequately without cramping or binding of any of the parts; and
- (3) The towed motor vehicle follows substantially in the path of the towing vehicle without whipping or swerving.

(c) **Post-trip inspection.** Motor carriers shall maintain practices to ensure that following completion of any trip in driveaway-towaway operation of motor vehicles in combination, and before they are used again, the towbars and saddle-mounts are disassembled and inspected for worn, bent, cracked, broken, or missing parts. Before reuse, suitable repair or replacement shall be made of any defective parts and the devices shall be properly reassembled.

[44 FR 38526, July 2, 1979, as amended at 53 FR 49410, Dec. 7, 1988; 53 FR 49968, Dec. 12, 1988]

§396.17 Periodic inspection.

(a) Every commercial motor vehicle shall be inspected as required by this section. The inspection shall include, at a minimum, the parts and accessories set forth in Appendix G of this subchapter.¹

Note: The term commercial motor vehicle includes each vehicle in a combination vehicle. For example, for a tractor semitrailer, fulltrailer combination, the tractor, semitrailer, and the fulltrailer (including the converter dolly if so equipped) shall each be inspected.

(b) Except as provided in §396.23, a motor carrier shall inspect or cause to be inspected all motor vehicles subject to its control.

¹Editor's Note: Appendix G follows the regulations in this Handbook.

Guidance: Drivers are required to conform to the posted speed limits prescribed by the jurisdictions in or through which the vehicle is being operated. Where the total trip is on highways with a speed limit of 65 mph, trips of 550-600 miles completed in 10 hours are considered questionable and the motor carrier may be asked to document that such trips can be made. Trips of 600 miles or more will be assumed to be incapable of being completed without violations of the speed limits and may be required to be documented. In areas where a 55 mph speed limit is in effect, trips of 450-500 miles are open to question, and runs of 500 miles or more are considered incapable of being made in compliance with the speed limit and hours of service limitation.

§392.7 Equipment, inspection and use.

No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:

- Service brakes, including trailer brake connections.
- Parking (hand) brake.
- Steering mechanism.
- Lighting devices and reflectors.
- Tires.
- Horn.
- Windshield wiper or wipers.
- Rear-vision mirror or mirrors.
- Coupling devices.

[33 FR 19732, Dec. 25, 1968, as amended at 60 FR 38746, July 28, 1995]

DOT Interpretations — §392.7

Question 1: Must a driver prepare a written report of a pretrip inspection performed under §392.7?

Guidance: No.

Question 2: Must both drivers of a team operation comply with the provisions of §392.7 before driving?

Guidance: §392.7 states that a driver must be satisfied that the vehicle is in good working order before operating the vehicle. If a driver is satisfied with a co-driver's inspection, or a safety lane inspection, then the requirement of this section will have been met.

§392.8 Emergency equipment, inspection, and use.

No commercial motor vehicle shall be driven unless the driver thereof is satisfied that the emergency equipment required by §393.95 of this subchapter is in place and ready for use; nor shall any driver fail to use or make use of such equipment when and as needed.

[49 FR 38290, Sept. 28, 1984, as amended at 60 FR 38746, July 28, 1995]

§392.9 Inspection of cargo, cargo securement devices and systems.

(a) **General.** A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless—

(1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in §§393.100 through 393.142 of this subchapter.

(2) The commercial motor vehicle's tailgate, tailboard, doors, tarpaulins, spare tire and other equipment

used in its operation, and the means of fastening the commercial motor vehicle's cargo, are secured; and

(3) The commercial motor vehicle's cargo or any other object does not obscure the driver's view ahead or to the right or left sides (except for drivers of self-steer dollies), interfere with the free movement of his/her arms or legs, prevent his/her free and ready access to accessories required for emergencies, or prevent the free and ready exit of any person from the commercial motor vehicle's cab or driver's compartment.

(b) **Drivers of trucks and truck tractors.** Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must—

(1) Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle;

(2) Inspect the cargo and the devices used to secure the cargo within the first 50 miles after beginning a trip and cause any adjustments to be made to the cargo or load securement devices as necessary, including adding more securement devices, to ensure that cargo cannot shift on or within, or fall from the commercial motor vehicle; and

(3) Reexamine the commercial motor vehicle's cargo and its load securement devices during the course of transportation and make any necessary adjustment to the cargo or load securement devices, including adding more securement devices, to ensure that cargo cannot shift on or within, or fall from, the commercial motor vehicle. Reexamination and any necessary adjustments must be made whenever—

(i) The driver makes a change of his/her duty status; or

(ii) The commercial motor vehicle has been driven for 3 hours; or

(iii) The commercial motor vehicle has been driven for 150 miles, whichever occurs first.

(4) The rules in this paragraph (b) do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver of a commercial motor vehicle that has been loaded in a manner that makes inspection of its cargo impracticable.

[36 FR 18863, Sept. 23, 1971, as amended at 37 FR 12642, June 27, 1972; 38 FR 23522, Aug. 31, 1973; 60 FR 38746, July 28, 1995; 63 FR 33278, June 18, 1998; 67 FR 61224, Sept. 27, 2002]

DOT Interpretations — §392.9

Question 1: Is a vehicle's cargo compartment considered sealed according to the terms of §392.9(b)(4) when it is secured with a padlock, to which the driver holds a key?

Guidance: No. The driver has ready access to the cargo compartment by using the padlock key and would be required to perform the examinations of the cargo and load-securing devices described in §392.9(b).

Question 2: Does the FHWA have authority to enforce the safe loading requirements against a shipper that is not the motor carrier?

Guidance: No, unless HM as defined in §172.101 are involved. It is the responsibility of the motor carrier and the driver to ensure that any cargo aboard a vehicle is properly loaded and secured.

Question 3: How may the motor carrier determine safe loading when a shipper has loaded and sealed the trailer?

Guidance: Under these circumstances, a motor carrier may fulfill its responsibilities for proper loading a number of ways. Examples are:

- a. Arrange for supervision of loading to determine compliance; or
- b. Obtain notation on the connecting line freight bill that the lading was properly loaded; or
- c. Obtain approval to break the seal to permit inspection.

Question 4: Is there a requirement that a driver must personally load, block, brace, and tie down the cargo on the property carrying CMV he/she drives?

Guidance: No. But the driver is required to be familiar with methods and procedures for securing cargo, and may have to adjust the cargo or load securing devices pursuant to §392.9(b).

§392.9a Operating authority.

(a) **Registration required.** A motor vehicle providing transportation requiring registration under 49 U.S.C. 13902 may not be operated without the required registration or operated beyond the scope of its registration.

(b) **Penalties.** Every motor vehicle providing transportation requiring registration under 49 U.S.C. 13902 shall be ordered out-of-service if determined to be operating without registration or beyond the scope of its registration. In addition, the motor carrier may be subject to penalties in accordance with 49 U.S.C. 14901.

(c) **Administrative Review.** Upon the issuance of the out-of-service order under paragraph (b) of this section, the driver shall comply immediately with such order. Opportunity for review shall be provided in accordance with section 554 of title 5, United States Code not later than 10 days after issuance of such order.

[67 FR 55165, Aug. 28, 2002]

§392.9b [Removed.]

Subpart B — Driving of Vehicles

§392.10 Railroad grade crossings; stopping required.

(a) Except as provided in paragraph (b) of this section, the driver of a commercial motor vehicle specified in paragraphs (1) through (6) of this section shall not cross a railroad track or tracks at grade unless he/she first: Stops the commercial motor vehicle within 50 feet of, and not closer than 15 feet to, the tracks; thereafter listens and looks in each direction along the tracks for an approaching train; and ascertains that no train is approaching. When it is safe to do so, the driver may drive the commercial motor vehicle across the tracks in a gear that permits the commercial motor vehicle to complete the crossing without a change of gears. The driver must not shift gears while crossing the tracks.

- (1) Every bus transporting passengers,
- (2) Every commercial motor vehicle transporting any quantity of a Division 2.3 chlorine.
- (3) Every commercial motor vehicle which, in accordance with the regulations of the Department of Transportation, is required to be marked or placarded with one of the following classifications:

(i) Division 1.1

(ii) Division 1.2, or Division 1.3

(iii) Division 2.3 Poison gas

(iv) Division 4.3

(v) Class 7

(vi) Class 3 Flammable

(vii) Division 5.1

(viii) Division 2.2

(ix) Division 2.3 Chlorine

(x) Division 6.1 Poison

(xi) Division 2.2 Oxygen

(xii) Division 2.1

(xiii) Class 3 Combustible liquid

(xiv) Division 4.1

(xv) Division 5.1

(xvi) Division 5.2

(xvii) Class 8

(xviii) Division 1.4

(4) Every cargo tank motor vehicle, whether loaded or empty, used for the transportation of any hazardous material as defined in the Hazardous Materials Regulations of the Department of Transportation, Parts 107 through 180 of this title.

(5) Every cargo tank motor vehicle transporting a commodity which at the time of loading has a temperature above its flashpoint as determined by Sec. 173.120 of this title.

(6) Every cargo tank motor vehicle, whether loaded or empty, transporting any commodity under exemption in accordance with the provisions of Subpart B of Part 107 of this title.

(b) A stop need not be made at:

(1) A streetcar crossing, or railroad tracks used exclusively for industrial switching purposes, within a business district, as defined in §390.5 of this chapter.

(2) A railroad grade crossing when a police officer or crossing flagman directs traffic to proceed,

(3) A railroad grade crossing controlled by a functioning highway traffic signal transmitting a green indication which, under local law, permits the commercial motor vehicle to proceed across the railroad tracks without slowing or stopping.

(4) An abandoned railroad grade crossing which is marked with a sign indicating that the rail line is abandoned,

(5) An industrial or spur line railroad grade crossing marked with a sign reading "Exempt." Such "Exempt" signs shall be erected only by or with the consent of the appropriate State or local authority.

[33 FR 19732, Dec. 25, 1968, as amended at 35 FR 7801, May 21, 1970; 38 FR 1589, Jan. 16, 1973; 40 FR 44555, Sept. 29, 1975; 45 FR 46424, July 10, 1980; 47 FR 47837, Oct. 28, 1982; 59 FR 63924, Dec. 12, 1994; 60 FR 38746, 38747, July 28, 1995]

PART 396 — INSPECTION, REPAIR, AND MAINTENANCE

- §396.1 Scope.
- §396.3 Inspection, repair and maintenance.
- §396.5 Lubrication.
- §396.7 Unsafe operations forbidden.
- §396.9 Inspection of motor vehicles in operation.
- §396.11 Driver vehicle inspection report(s).
- §396.13 Driver inspection.
- §396.15 Driveaway-towaway operations and inspections.
- §396.17 Periodic inspection.
- §396.19 Inspector qualifications.
- §396.21 Periodic inspection recordkeeping requirements.
- §396.23 Equivalent to periodic inspection.*
- §396.25 Qualifications of brake inspectors.

AUTHORITY: 49 U.S.C. 31133, 31136, and 31502; and 49 CFR 1.73.

§396.1 Scope.

General — Every motor carrier, its officers, drivers, agents, representatives, and employees directly concerned with the inspection or maintenance of motor vehicles shall comply and be conversant with the rules of this part.

[44 FR 38526, July 2, 1979, as amended at 53 FR 18058, May 19, 1988]

§396.3 Inspection, repair and maintenance.

(a) **General** — Every motor carrier shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control.

(1) Parts and accessories shall be in safe and proper operating condition at all times. These include those specified in Part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems.

(2) Pushout windows, emergency doors, and emergency door marking lights in buses shall be inspected at least every 90 days.

(b) **Required records** — For vehicles controlled for 30 consecutive days or more, except for a private motor carrier of passengers (nonbusiness), the motor carriers shall maintain, or cause to be maintained, the following record for each vehicle:

(1) An identification of the vehicle including company number, if so marked, make, serial number, year, and tire size. In addition, if the motor vehicle is not owned by the motor carrier, the record shall identify the name of the person furnishing the vehicle;

(2) A means to indicate the nature and due date of the various inspection and maintenance operations to be performed;

(3) A record of inspection, repairs and maintenance indicating their date and nature; and

(4) A record of tests conducted on pushout windows, emergency doors, and emergency door marking lights on buses.

(c) **Record retention** — The records required by this section shall be retained where the vehicle is either housed or maintained for a period of 1 year and for 6 months after the motor vehicle leaves the motor carrier's control.

[44 FR 38526, July 2, 1979, as amended at 48 FR 55868, Dec. 16, 1983; 53 FR 18058, May 19, 1988; 59 FR 8753, Feb. 23, 1994; 59 FR 60324, Nov. 23, 1994]]

DOT Interpretations — §396.3

Question 1: What is meant by "systematic inspection, repair, and maintenance"?

Guidance: Generally, systematic means a regular or scheduled program to keep vehicles in a safe operating condition. §396.3 does not specify inspection, maintenance, or repair intervals because such intervals are fleet specific and, in some instances, vehicle specific. The inspection, repair, and maintenance intervals are to be determined by the motor carrier. The requirements of §§396.11, 396.13, and 396.17 are in addition to the systematic inspection, repair, and maintenance required by §396.3.

Question 2: 396.3(b)(4) refers to a record of tests. What tests are required of push-out windows and emergency door lamps on buses?

Guidance: Generally, inspection of a push-out window would require pushing out the window. However, if the window may be destroyed by pushing out to test its proper functioning, a visual inspection may qualify as a test if the inspector can ascertain the proper functioning of the window without opening it. Checking to ensure that the rubber push-out molding is properly in place and has not deteriorated and that any handles or marking instructions have not been tampered with would meet the test requirement. Inspection of emergency door marking lights would require opening the door to test the lights.

Question 3: Who has the responsibility of inspecting and maintaining leased vehicles and their maintenance records?

Guidance: The motor carrier must either inspect, repair, maintain, and keep suitable records for all vehicles subject to its control for 30 consecutive days or more, or cause another party to perform such activities. The motor carrier is solely responsible for ensuring that the vehicles under its control are in safe operating condition and that defects have been corrected.

Question 4: Is computerized recordkeeping of CMV inspection and maintenance information permissible under §396.3 of the FMCSRs?

Guidance: Yes, if the minimum inspection, repair, and maintenance records required are included in the computer information system and can be reproduced on demand.

Question 5: Where must vehicle inspection and maintenance records be retained if a vehicle is not housed or maintained at a single location?

Guidance: The motor carrier may retain the records at a location of its choice. If the vehicle maintenance records are retained at a location apart from the vehicle, the motor carrier is not relieved of its responsibility for ensuring that the records are current and factual. In all cases, however, upon request of the FHWA the maintenance records must be made available within a reasonable period of time (2 working days).

§396.5 Lubrication.

Every motor carrier shall ensure that each motor vehicle subject to its control is—

- (a) properly lubricated; and
- (b) free of oil and grease leaks.

STATE OF MICHIGAN
IN THE SUPREME COURT

BEVERLY HEIKKILA, Personal
Representative for the Estate of
Sheri L. Williams,

Plaintiff-Appellee,

v

MARC ROLLAND SEVIGNY, J.R. PHILLIPS
TRUCKING, LIMITED, a foreign corporation,

Defendants-Appellants,
and

NORTH STAR, INC., a Michigan corporation,
and INTERNATIONAL MILL SERVICE, INC.,
a Michigan corporation, Jointly and Severally,

Defendants.

Supreme Court
Case No. _____

Court of Appeals
Case No. 246761

Monroe Circuit Court
Case No. 00-11135-NI

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

ENIS J. BLIZMAN, being first duly sworn, deposes and says that she is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for defendants-appellants, J.R. PHILLIPS TRUCKING, LIMITED., and MARC ROLLAND SEVIGNY, in the above-entitled cause of action and that on the 9th day of December, 2005, she caused to be served a true copy of an **DEFENDANTS-APPELLANTS, MARC R. SEVIGNY AND J.R. PHILLIPS TRUCKING'S REPLY AND SUPPLEMENTAL BRIEF** and a copy of this **PROOF OF SERVICE** upon the attorneys of record by enclosing a true copy of same in a well-sealed envelope addressed as follows:

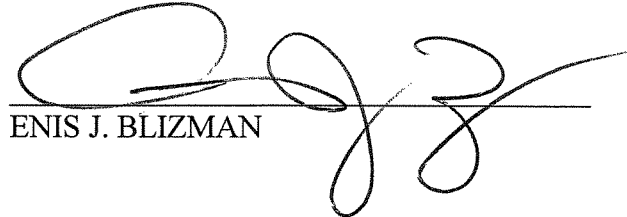
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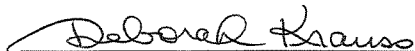
Stuart H. Teger, Esq.
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Detroit, MI 48226

with full legal postage prepaid thereon and deposited in the United States mail.

Further, deponent saith not.


ENIS J. BLIZMAN

Signed and sworn to before me, a Notary Public,
in Wayne County, Michigan, on this 9th day of
December, 2005.


Notary Public, Wayne County, Michigan
Acting in the County of Wayne, Michigan
My commission expires:
622004.1

DEBORAH KRAUSS
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Sep 18, 2008